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No. 05-1311

In the Supreme Court of the United States

CITIZENS FOR HEALTH; AMERICAN ASSOCIATION FOR HEALTH FREEDOM; AMERICAN ASSOCIATION OF PRACTICING PSYCHIATRISTS; AMERICAN MENTAL HEALTH ALLIANCE-USA; AMERICAN PSYCHOANALYTIC ASSOCIATION; NATIONAL COALITION OF MENTAL HEALTH PROFESSIONALS AND CONSUMERS; NEW HAMPSHIRE CITIZENS FOR HEALTH FREEDOM; SALLY SCOFIELD; TED KOREN, DC; MICHAELE DUNLAP, PSY.D.; MORTON ZIVAN, PH.D.; CALIFORNIA CONSUMER HEALTHCARE COUNCIL; CONGRESS OF CALIFORNIA SENIORS; HEALTH ADMINISTRATION RESPONSIBILITY PROJECT; DANIEL S. SHRAGER; EUGENE B. MEYER; JANE DOE; JANIS CHESTER; DEBORAH PEEL,
PETITIONERS

v.

MICHAEL O. LEAVITT, SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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Reply Brief of Petitioners

As permitted by Rule 15.6 of the Rules of the Supreme Court, Petitioners ("Citizens") submit this reply brief to address new points raised by the Respondent in his brief in opposition to Petitioners' petition for certiorari.

In his opposition brief, Respondent relies extensively on the Court's ruling in American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) and to a lesser extent on the holding in Arbaugh v. Y&H Corp., 126 S. Ct. 1235 (2006). Resp. Br. 9-11, 13. Neither party has cited these cases in the course of this litigation, nor did the Court of Appeals cite them or rely on their holdings in any way. The decision in Arbaugh involved whether an employee-numerosity requirement in the Civil Rights Act of 1964 was a jurisdictional requirement or an element of a plaintiff's claim for relief. 126 S. Ct. at 1242. The decision did not address the state action issue or the constitutional right to privacy, and is, therefore, irrelevant to the issues presented by Citizens.

Respondent seeks to make the decision in American Manufacturers relevant by mischaracterizing both the Amended Privacy Rule and the essence of Citizens' constitutional claim. Throughout his brief, Respondent describes the Amended Rule as merely allowing covered entities to seek consent and imposing restrictions on their ability to disclose Citizens' health information. Resp. Br. 4, 8. Respondent describes Citizens' complaint as contending that the rule violates their rights under the First and Fifth Amendments by failing to require certain health providers to obtain consent for the disclosure of their identifiable health information for purposes such as treatment and payment. Resp. Br. 8. See also Respondent's characterization of the issue as constitutionality of a regulation that does not require treatment providers to obtain consent (Resp. Br. (I)), "[p]etitioners believe that additional use and disclosure restrictions are warranted" (Resp. Br. 9), Amended Rule

described as "HHS' decision not to prohibit certain private disclosures" (Id.), Amended Rule "challenged principally on substantive due process grounds rather than Fourth Amendment grounds" (Resp. Br. 12), Amended Rule described as "HHS' decision not to impose a categorical ban on unconsented uses or disclosures of privacy information" (Resp. Br. 13).

Respondent carefully and repeatedly suppresses the fact that the Amended Rule not only eliminated the requirement in the Final Original Rule that health care providers obtain consent before disclosing individuals' identifiable health information but also granted "regulatory permission" to all covered entities, including the Secretary himself, and their business associates to use and disclose Citizens' identifiable health information for treatment, payment and health care operations without their consent and over their objection. Pet. 8a. Respondent also ignores the fact that this express federal authorization to violate Citizens' health information privacy was conferred by the Amended Rule on both private entities and federal officials for the first time in the nation's history. Pet. 2-4. See also Pet. 8a. Respondent's repeated suppression of this feature of the Amended Rule eloquently illustrates his appreciation of its significance with respect to the state action question.

Contrary to Respondent's description, Citizen's constitutional complaint is that federal "regulatory permission" for the disclosure of their identifiable health information by private and governmental entities granted by the Amended Rule has essentially eliminated their right to health information privacy as protected by the First, Fourth, Fifth and Ninth Amendments. Pet. 5. Both the District Court and the Court of Appeals found that Citizens' health information privacy was, in fact, being violated by covered entities because of the Amended Rule or imminently would be. Pet. 6, 8.

Like the Court of Appeals, Respondent cites no case law authority from this or any other court for the central

holding in the decision that state action cannot exist "unless the law itself suddenly authorized something that was previously prohibited." Pet. 9. Surely if there was a federal court decision at any level supporting this novel concept it would have been cited by the Court of Appeals or the Respondent. Respondent simply dismisses nearly 100 years of state action case law to the contrary as "largely beside the point." Resp. Br. 12.

By relying on the holding in American Manufacturers, Respondent concedes that the Court of Appeals in this case failed to apply the criteria that are essential for determining the existence of state action. The Court in that case, unlike the Court of Appeals here, examined whether the State provided "significant encouragement, either overt or covert" as well as whether it exercised coercive power in violating Citizens' health privacy. Compare Pet. 13-21 with Resp. Br. 10.[1] Further, Respondent, again like the Court of Appeals, fails even to mention this Court's recent holding in Brentwood Academy v. Tennessee Secondary School Ass'n, 531 U.S. 288, 121 S. Ct. 924 (2001) and the Court's recognition of the "judicial obligation" to assure that constitutional standards are invoked by examining a constitutional claim under established state action criteria. Pet. 21-28.

As the Brentwood Court noted, the determination of state action is a "necessarily fact-bound inquiry." 531 U.S. at 298, 121 S. Ct. at 932. Accordingly, the fact that the Amended Rule "replaced" the individual's right of consent for disclosure of health information with an unprecedented, explicit federal right for covered entities to disclose such health information is critical for determining whether state action is present.

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[1] The Court also considered a series of other state action criteria precisely as the Court of Appeals in this case failed to do. 526 U.S. at 55-58. See Pet. 21.

The issue in American Manufacturers was whether a private insurer's decision to withhold payment of workers' compensation claims for thirty days in order to assess the validity of the claims amounted to state action since the private action was based on an amendment to the state's workers' compensation statute. Prior to the amendment, the statute required all claims to be paid within 30 days without such an evaluation. 526 U.S. at 51. The Court found that, while "significant encouragement" of private action is a potential basis for a finding of state action, the encouragement in this case was too "subtle." 526 U.S. at 53.

The Court noted that it had never held that "the mere availability of a remedy for wrongful conduct" so significantly encourages private conduct as to make the State responsible for it. Id. The Court explained further that the amendment to the statute on which the private action was based merely "restored to insurers the narrow option, historically exercised by employers before the adoption of [the state's] workers' compensation law, to defer payment of a bill until it is substantiated." 526 U.S. at 54. Therefore, the effect of the amendment was as though the state had not acted, and State "inaction" typically cannot be viewed as "authorization" or "encouragement." Id.[2]

The Amended Privacy Rule in this case does not make available a remedy for wrongful conduct. To the contrary, the undisputed facts are that the Amended Rule authorized the disclosure of identifiable health information that is prohibited by many state laws and standards of

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[2] Respondent tries to stretch the holding in American Manufacturers—that "permission of a private choice cannot support a finding of state action"—into a "general principle." Resp. Br. 15. However, Respondent omits a critical word from the Court's holding which actually reads, "Such permission of a private choice cannot support a finding of state action." (emphasis added) 526 U.S. at 54. Thus, the holding cited by Respondent pertains specifically to situations where the State is merely removing an impediment to a preexisting right, a fact pattern not present in this case.

medical ethics. Citizens showed that they were prevented from asserting their privacy rights under state law because the Amended Rule authorized the disclosure of their health information without notice of the disclosure or notice of the recipient of the information. The Court of Appeals found this fact "regrettable and disquieting." Pet. 23a. Thus, the Amended Rule actually eliminates a privacy remedy that Citizens have historically enjoyed and is authorizing conduct that is wrongful under state laws and standards of medical ethics.

Nor does the Amended Rule restore a right to disclose Citizens' identifiable health information which covered entities or the Secretary once enjoyed. Rather the Amended Rule creates a wholly new and unprecedented right for covered entities, including the Secretary, to disclose Citizens' identifiable health information without their consent and over their objection. As both the District Court and the Court of Appeals noted, the undisputed facts show that prior to the Amended Rule, Citizens could control the disclosure of their health information, and after the adoption of the Amended Rule they could not. This loss of health information privacy was directly attributable to covered entities cloaking themselves in the mantle of federal authority conferred by the Rule. The Amended Rule unquestionably "changed the landscape" with respect to whether Citizens could protect the privacy of their health information. Pet. 35a, 63a-64a. The record also shows that, prior to the Amended Rule, "all hospitals" and "90 percent of the non-hospital providers" obtained consent for the disclosure of identifiable health information. 65 Fed. Reg. 82462 at 82,474, 82,771 (December 28, 2000).

Of course, unlike the State in American Manufacturers, the Secretary here actually conferred authority to violate Citizens' health privacy upon himself as a covered entity. The Court of Appeals did not find this fact relevant to whether Citizens' constitutional claims should be considered for the stated reason that Citizens did not

challenge any specific disclosures by HHS or any of the federal agency health plans it supervises. Pet. 38a. The Court of Appeals thereby ignored the principle recognized by this Court in Santa Fe Indep. School District v. Doe, 530 U.S. 290, 316, 120 S. Ct. 2266, 2282-83 (2000) that the simple enactment or adoption of a measure by a State that is intended to authorize private individuals to violate constitutionally protected rights is a sufficient basis for constitutional review and relief even if the authority is not exercised.

Further, Respondent has never disputed that the Secretary can disclose, and is disclosing, Citizens' identifiable health information under the self-conferred authority of the Amended Rule. In fact, the Secretary has placed notices to this effect on a public website.[3]

Respondent erroneously argues that the facts in American Manufacturers are more analogous to this case than those in Skinner v. Railway Labor Executives, 489 U.S. 602, 109 S. Ct. 1402 (1989) cited by Petitioners. Resp. Br. 11-12 and Pet. 20-21. The issue in Skinner was whether a regulation issued by a federal agency that authorized, but did not require, private railroads to infringe the medical privacy of their employees violated the employees' right to health privacy protected by the Fourth Amendment. 489 U.S. at 606.

The Secretary of Transportation, who had issued the regulation in Skinner, made exactly the argument that was the basis for the Court of Appeal's decision in this case—that there was no state action solely because the regulation was permissive and did not compel private entities to take any action. 489 U.S. at 614. The Court expressly rejected that

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[3] See http://www.medicare.gov/privacypractices.asp, "Medicare **has the right** to give out your personal medical information [for routine uses]." (emphasis original). Indian Health Serv., Notice of Privacy Practices, (2003) "We will use and disclose your health information for [routine uses]."

argument and found state action based on "clear indices of the Government's encouragement, endorsement, and participation" in the private action. 489 U.S. at 615-616. Respondent argues that those indices are not present in this case. Resp. Br. 12. However, the Court of Appeals' decision is devoid of any such analysis, and Respondent cannot supply a rationale that is absent from the court's decision.

In any event, there are much stronger indices of government involvement in the violation of Citizens' rights to heath privacy than were present in Skinner. The regulation at issue in Skinner provided that breath and urine tests "may" be ordered by railroads under certain circumstances without a warrant and without a particularized suspicion of drug or alcohol use. 489 U.S. at 611. The specific question before the Court was whether this permissive violation of individuals' health privacy violated their right to privacy protected by the Fourth Amendment. The Court found state action was present because, among other reasons, the agency had expressed "its desire to share the fruits of such intrusions." 489 U.S. at 615. Respondent in this case is far more involved because he has granted authority to himself to directly violate the health information privacy of Citizens.

Another reason for the Skinner Court's finding of state action was that the government had "removed all legal barriers" to the violation of the employees' health privacy. Id. Likewise, the Amended Rule has authorized covered entities to violate Citizens' health privacy without notice or an opportunity to assert their privacy rights under state law or the Constitution.

The Skinner Court also relied on the fact that the railroad could not divest itself or otherwise compromise the authority conferred by the regulation. Id. Similarly, the Amended Rule confers discretion on covered entities to provide a consent process by agreeing to requests for restrictions on the disclosure of health information. However, the Rule reserves the authority to covered entities to deny those requests, and they cannot divest themselves of

that authority. 45 C.F.R. §164.522(a)(1)(B)(ii) (2002). It was an undisputed finding by the District Court that all such requests have been summarily denied based on the authority granted to covered entities in the Rule. Pet. 63a.

The Court also found it persuasive that the federal agency had "made plain" its strong preference for the testing. 489 U.S. at 615. Similarly the Amended Rule expresses a strong preference for unauthorized disclosure of Citizens' health information by compelling all covered entities to provide a notice of privacy practices that must first describe the nonconsensual disclosures authorized by the Rule regardless of the privacy practices actually adopted by the covered entity. That preference resulted in the near universal adoption of the Rule's nonconsensual disclosure process for identifiable health information. Pet. 24.

Perhaps most significantly, the Skinner Court's state action finding also rested on the fact that the employees were not free to decline the employer's request that they submit to the breath or urine tests. 489 U.S. at 615. As the District Court and Court of Appeals both acknowledged, Citizens have no option under the Amended Rule to refuse to have their identifiable health information disclosed by covered entities. Pet. 34a-36a, 61a-65a.

At least one factual difference between Skinner and the present case even more strongly supports a finding of state action. The regulation in Skinner involved only breath and urine tests under specific circumstances, while the Amended Rule infringes the right to privacy for all health information in broadly defined routine situations. The factual situation in this case is more analogous to Skinner than to American Manufacturers in that the right conferred on railroad employers to administer the breath and urine tests, like the right of covered entities to disclose Citizens' health information, was unprecedented.

Finally, Respondent argues that the Amended Rule does not violate any of Citizens existing privacy protections. Resp. Br. 8. As the Court in Skinner found, however,

individuals have a constitutionally protected right to privacy where they have "an expectation of privacy that society is prepared to recognize as reasonable." 489 U.S. at 616. Whether that right will be upheld in a particular case may depend upon whether the individuals participate in an industry that is regulated pervasively to ensure safety. 489 U.S. at 627.[4] In this case, Citizens have shown that they have an expectation of privacy for their identifiable health information that society has always recognized as reasonable as evidenced by established standards of medical ethics and established medical practice. Constitutional protection for this right has been recognized repeatedly. See, e.g., Ferguson v. City of Charleston, 532 U.S. 67, 78, 121 S. Ct. 1281, 1288 (2001); Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869 (1977); United States v. Scott, 424 F.3d 888 (9th Cir. 2005); Douglas v. Dobbs, 419 F.3d 1097 (10th Cir. 2005); Tucson Woman's Clinic v. Eden, 371 F.3d 1173 (4th Cir. 2004). The Court of Appeals may be correct that "the scope of the constitutional right to privacy in one's medical information is largely unresolved," but there can be no doubt that Citizens have such a right. The Amended Rule authorizes the disclosure of Citizens' past, present and future health information regardless of whether they seek health services or file a claim for reimbursement. Citizens have done nothing to diminish that reasonable expectation of privacy, and they have a constitutionally protected right to not have that right violated by the federal government either directly or by authorizing others to extinguish it indirectly.

Respondent has shown no reason why this petition should not be granted.

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[4] In Skinner, the Court ultimately upheld the constitutionality of the testing regulation largely because of the diminished expectation of privacy by railroad employees performing duties that could risk public safety. Petitioners inadvertently stated that this rule had been struck down on constitutional grounds. Pet. 20.

Respectfully submitted,

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